(14)

No. 92-97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC. *et al.*,
Petitioners,

v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR NEW HAMPSHIRE, ARIZONA, CALIFORNIA, FLORIDA, IOWA, MAINE, MICHIGAN, MONTANA, NEW JERSEY, NORTH DAKOTA, SOUTH DAKOTA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress' exercise of its plenary authority under the Commerce Clause in enacting the Anti-Head Tax Act, which expressly authorizes States to assess certain airport fees, precludes judicial review of the impact of those fees upon interstate commerce under the "dormant" Commerce Clause.

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INTEREST OF THE AMICI CURIAE

New Hampshire, Arizona, California, Florida, Iowa, Maine, Michigan, Montana, New Jersey, North Dakota, South Dakota and Wisconsin have a strong interest in the issues presented in this case. The States write *amici curiae* to support the position that the Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, is inapplicable to Petitioners' challenge to the Respondents' assessment of various airport service fees. This Court's affirmance of the Sixth Circuit Court of Appeals would foreclose Commerce Clause suits against States in which fees assessed under the Anti-Head Tax Act ("AHTA" or "Act") as well as other federal statutes are challenged.

The States take no position on the Sixth Circuit's determination that the AHTA provides a private cause of action or the Court's findings with respect to the reasonableness of the challenged fees and charges under the Act.

The preclusion of dormant Commerce Clause analysis is of great concern to the States because they assess numerous service, user and licensing fees authorized by federal statutes. These assessments should not be jeopardized by legal challenges brought under the dormant Commerce Clause. Congress, not the courts, is best qualified to resolve the competing interests and issues involved in interstate commerce. *See Quill Corp. v. North Dakota*, 504 U.S. ____, 112 S. Ct. 1904, 1916 (1992). Courts should not conduct an independent analysis of such fees under Commerce Clause principles when Congress has invoked its authority under the Commerce Clause to provide an alternative standard or has authorized States to establish their own independent standards for permissible charges.

The federal statute at issue in this case, the Anti-Head Tax Act, provides specific prohibitions as well as specific authorizations to States and political subdivisions in their assessments upon commercial airline carriers. The Court of Appeals properly determined that, in a challenge to the reasonableness of the fees, a court "should only look at the consistency between

the fees and congressional policy." *Northwest Airlines, et al. v. County of Kent, Michigan, et al.*, 955 F.2d 1054, 1063 (6th Cir. 1992). States, too, should be free to look exclusively to the requirements of federal enabling legislation when assessing congressionally authorized service, user and licensing fees.

This issue is arising with increasing frequency as recalcitrant fee-payers use the Commerce Clause to transform what would otherwise be statutory objections to fee assessments into constitutional challenges.[1] Defending these cases burdens States with the costs of unnecessary litigation and disrupts effective cost recovery in the States' various service and regulatory programs. In addition, the prospect of court-ordered refunds of airport fees, collected in good faith compliance with federal statute but later held to be violative of the dormant Commerce Clause, would imperil the financial viability of the nation's state and local airports. The potential impact of retroactive refunds of other types of regulatory fees on state and local governments would be similarly profound. Moreover, should this Court not expressly affirm the Court of Appeals' ruling, the possibility of obtaining attorneys' fees through Commerce Clause based 42 U.S.C. § 1983 claims is likely to incite an even greater number of such lawsuits.

Accordingly, the *amici* States urge the Court to address the Sixth Circuit's ruling on the Commerce Clause.

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[1] Similar claims have been made, for example, in the context of hazardous waste transporter fees which States are specifically authorized to assess so long as the fees are "equitable" and used for certain purposes. 49 USC App. § 1811(b); *American Trucking Associations, Inc. v. New Hampshire*, No. 92-E-604-B (N.H. Super. Ct. Merr. County, filed November 13, 1992).

SUMMARY OF ARGUMENT

The Commerce Clause issue in this case involves Congress' "plenary" power under the interstate Commerce Clause. *See H.P. Hood & Sons, Inc. v. Dumond*, 336 U.S. 525, 542 (1949). The Commerce Clause empowers Congress and has been interpreted by this Court to limit state regulation and taxation of interstate commerce when Congress' power lies "dormant." *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 422 (1946). These "negative implications" of the Commerce Clause present themselves only if Congress has not acquiesced in or prohibited the challenged state laws. Congressional activity, therefore, will disrupt the "dormancy" of the Commerce Clause, *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 214 (1983), and foreclose any Commerce Clause challenge to state regulations.

In this case, Petitioners, seven domestic airline carriers, challenge under the Anti-Head-Tax Act and the Commerce Clause certain service charges assessed against users of the Kent County International Airport.[2] The Petitioners' Commerce Clause claim was properly dismissed by the District Court, and that dismissal was affirmed by the Sixth Circuit Court of Appeals because the Anti-Head-Tax Act constitutes congressional action pursuant to the Commerce Clause.

The Anti-Head-Tax Act prohibits States from assessing certain "head charges" and expressly authorizes certain other "reasonable . . . service charges . . . for the use of airport facilities." 49 USC App. § 1513. This legislation affecting interstate commerce renders the Commerce Clause no longer dormant with respect to the challenged fees and charges. Congress has, in enacting the provision which authorizes airport service charges and mandates they be "reasonable", clearly provided the con-

[2] Respondents are the County of Kent, Michigan, the Kent County Board of Aeronautics, and the Kent County Department of Aeronautics.

gressional action required to permit States to act. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

In the presence of clear congressional action authorizing particular state regulations, courts are not free to impose the negative implications of the Commerce Clause. It is only when Congress has not acted under the Commerce Clause that this Court "is the final arbiter of the competing demands of state and national interests." *Japan Line Limited v. County of Los Angeles*, 441 U.S. 434, 454 (1979) (quoting *Southern Pacific Company v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)). This Court previously determined in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 16 (1986) that the AHTA "addresses the issue of 'State taxation of air commerce.'" The AHTA just as surely addresses the issue of state imposition of airport service fees.

Because the AHTA is express and unambiguous in its authorization of airport service charges, it is "unmistakably clear" that Congress intended to grant to the States the power to assess the challenged fees so long as the assessments conform to the federally prescribed standards. *See South-Central Timber Development v. Wunnicke*, 467 U.S. 82, 91 (1984). To construe the AHTA so as to preserve a dormant Commerce Clause cause of action contravenes this Court's prior rulings and defies the statute's express language, congressional intent and ordinary canons of statutory construction. Accordingly, the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. DORMANT COMMERCE CLAUSE REVIEW IS UNAVAILABLE TO CHALLENGE AIRPORT SERVICE FEES AUTHORIZED BY THE AHTA

The Commerce Clause portion of this case goes to the heart of Congress' authority under that provision. In 1973, Congress enacted the Anti-Head Tax Act, prohibiting state and local gov-

ernments from imposing so-called "head taxes" directly or indirectly on air passengers. *See* Airport Development Acceleration Act of 1973, Pub. L. 93-44, §7, 87 Stat. 90 (codified as amended at 49 USC App. § 1513). The AHTA additionally provides, however, that "[N]othing in this section shall prohibit [state and local governments] owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities". 49 USC App. § 1513(b). Despite Petitioners' constitutional claim, the Court of Appeals declined to conduct an independent analysis of the challenged fees under the dormant Commerce Clause. It concluded that, in enacting the AHTA, Congress "established clear guidelines for the fees and rates" that airports charge, thus foreclosing dormant Commerce Clause review. *Northwest Airlines*, 955 F.2d at 1063. *See Wardair*, 477 U.S. at 9.

Petitioners and their *amici* argue that the Court of Appeals erred, claiming that "savings clauses" like § 1513(b) "merely limit the scope of federal preemption" and do not evince an intent to approve legislation that would otherwise violate the Commerce Clause. Brief for Petitioners at 42. They also assert that the Sixth Circuit has announced a new standard which "would supplant the dormant Commerce Clause, providing the States with a license to tax and regulate irrespective of any adverse effects on interstate commerce other than those prohibited by each particular regulatory scheme." Brief for American Trucking Associations, Inc. as Amicus Curiae Supporting Petitioners at 18-19.

However, the Sixth Circuit's ruling is neither erroneous nor novel. Rather, it follows directly from a series of decisions of this Court recognizing Congress' "plenary authority" to regulate commerce among the several States. *See Western and Southern Life Insurance Co. v. State Board of Equalization*,

451 U.S. 648, 652 (1981).[3] The Court's analysis in these cases begins with the recognition that "the Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body." *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 213 (1983). This Court has prescribed that judicial review of state taxes and regulations is only appropriate under the Commerce Clause "when Congress has not acted or purported to act." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). *See* Lawrence Tribe, *Constitutional Law* §6-25, p. 479 (2d Ed., 1988) ("Courts assess the validity of state regulations in independent constitutional terms [under the dormant Commerce Clause] only when Congress has not chosen to act.")

In reviewing exercises of Congress' plenary authority, this Court has frequently been called upon to evaluate Congress' intent "to alter the limits of state power otherwise imposed by the Commerce Clause." *Wyoming v. Oklahoma*, 502 U.S. ____, 112 S. Ct. 789, 802 (1992) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (internal quotation marks omitted)). In those instances in which Congress by its actions has "at least acquiesced" in state or local government action, it is not subject to the Commerce Clause no matter what the result of a dormant Commerce Clause analysis would be. *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 12 (1980). In such cases, "it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action." *See Merrion*, 455 U.S. at 154. In fact, as this Court stated in *Wardair*, "[i]t would turn dormant Commerce Clause analysis entirely upside down to apply it when the Federal Government has acted." 477 U.S. at 9.

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[3] This expansive authority is subject only to the limitations contained in the Constitution, none of which is presented in this case. *See New York v. United States*, 505 U.S. ____, 112 S. Ct. 2408, 2418 (1992).

Petitioners do not explicitly challenge Congress' authority to remove certain state fees from the ambit of the dormant Commerce Clause and provide an alternate standard for their legality. Instead, Petitioners and their *amici* argue that this Court has established a principle that "if Congress means to . . . preclude Commerce Clause review, it must say so expressly and unmistakably." *See* Petitioners' Brief at 41 n. 50. As will be demonstrated in Sections II and III, *infra*, the AHTA's express terms, as reviewed by this Court in *Wardair*, make clear that Congress intended to displace the dormant Commerce Clause. In addition, even if it is determined that *Wardair* is not by itself controlling, Congress' decision to "affirmatively sanction" the airport service fees manifests Congress' implementation of its authority under the Commerce Clause. The "unmistakably clear" standard relied upon by Petitioners is satisfied where Congress has "affirmatively sanction[ed]" particular state action. *See White*, 460 U.S. at 215. As a result, Respondents' fee assessments do not fall within the purview of the dormant Commerce Clause.

II. THE PLAIN LANGUAGE OF THE AHTA REVEALS THAT CONGRESS DISPLACED THE COMMERCE CLAUSE

A. The Plain Meaning of the AHTA Manifests Congress' Approval of the State-Assessed Fees

The AHTA is unambiguous and express in its terms. The text, in pertinent part, reads:

> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . . .

> (b) . . . [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 USC App. § 1513.

While conceding that the AHTA is applicable to the contested fees, Petitioners nonetheless urge that the statute's requirements should be augmented with those imposed by the dormant Commerce Clause. Petitioners apparently reason that, while Congress expressly enacted a substantive standard for the assessment and use of rental charges, landing fees and other service charges by government-owned airports, it silently intended that those same fees also be subject to the full implications of the Commerce Clause which apply only when Congress has *not* acted. Petitioners have offered no authority for this argument which is illogical and contrary to the AHTA's express terms as well as this Court's canons of construction.

The plain language of the AHTA eliminates the applicability of the negative implications of the Commerce Clause. This Court has firmly expressed its task to be that of giving effect to the will of Congress, and where "its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. ____, 113 S. Ct. 1119, 1122, 1123 (1993) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)). The "plain meaning" rule pronounced by this Court requires that in determining the scope of a statute, courts look first to its language. The "starting point" in a case involving the construction of a statute, or in

"any case involving the meaning of a statute, is the language of the statute itself." *Department of Treasury v. Fabe*, 508 U.S. ____, 113 S. Ct. 2202, 2207, 2208 (1993).

To subject the fees challenged in this case to dormant Commerce Clause standards defies the plain words of the AHTA. Specifically, such scrutiny ignores the "reasonable" requirement of 49 USC App. § 1513(b) and its mandate with respect to the use of fee receipts.[4] Thus, if the fees are subject to dormant Commerce Clause analysis, the word "reasonable" and the clause, "for the use of airport facilities," become nullities. Such a construction is contrary to this Court's rule of interpretation requiring it "to give effect if possible to every clause and word of a statute." *Gade v. National Solid Waste*, 505 U.S. ____, 112 S. Ct. 2374, 2384 (1992) (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)).[5]

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[4] At least one federal court has ruled that the § 1513(b) authorization is limited to reasonable fees and charges that "are to be used to operate and maintain the *presently existing* airport facilities." *City and County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834, 840 (D. Colo. 1989) (emphasis added).

[5] Moreover, should this Court elect to refer to the legislative history of the AHTA, the materials will reinforce its reading of the statute's "plain language." *See United States v. Texas*, 507 U.S. ____, 113 S. Ct. 1631, 1636 (1993). The conference committee's report on the AHTA reveals that there was no question that Section 7 of the Senate bill was intended to allow for the continued levy and collection of reasonable rental charges, landing fees, and other service charges for the use by airlines of airport facilities. Conf. Rep. No. 93-225, 93rd Cong., 1st Sess. (1973). The conference committee's report states:

> The Senate bill also provided that the prohibition would not extend to the levy or collection of other taxes, such as property taxes, net income taxes, franchise taxes, and sales or use taxes, nor to the levy and or collection of other charges such as reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Id., *reprinted in* 1973 U.S. Code Congressional and Administrative News, p. 1434, 1458.

In addition to lacking any support in the statute's plain terms or this Court's canons of statutory interpretation, the construction of the AHTA proffered by Petitioners would be impracticable to apply. In fact, such a construction would create immediate and unavoidable uncertainty as to whether the Commerce Clause or the AHTA effects the more exacting standard.[6]

Petitioners have attempted to cast this Court's holding in *Wardair*, 477 U.S. 1, as prescribing dormant Commerce Clause review in the instant case. However, that decision relies on the plain language of the AHTA and conclusively demonstrates that it was Congress' choice that the AHTA alone control the legality of airport service fees.

B. The AHTA Addresses The Assessment of Airport Service Charges

This Court all but decided the instant issue in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986), its most recent interpretation of the AHTA. In a challenge brought by foreign airlines to Florida's aviation fuel sales tax, this Court determined that "the Act expressly permits States to impose such taxes." *Id.* at 6. The Court went on to consider the dormant Commerce Clause issue separately from the AHTA only because the AHTA did not reveal if Congress intended this permission to extend to the imposition of a sales tax on foreign, as opposed to domestic, carriers.

> It is, of course, plausible that Congress never considered whether States should be permitted to impose sales taxes on foreign, as opposed to domestic, carriers,

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[6] Petitioners and their *amici* assert that the AHTA presents the "stricter" standard, but nonetheless seek application of the Commerce Clause. *See* Petitioners' Brief at 21; American Trucking Associations, Inc. Brief at 8, n. 5, 19-20.

> and *therefore we do not rely on the existence of this section* to answer the Commerce Clause issue raised here by appellant and considered by us below.

Id. at 7 (emphasis added). The evident implication of this Court's explanation is that such a reference would have foreclosed Commerce Clause review.[7]

Ultimately, this Court concluded that, even without considering the AHTA, it did not "confront federal government silence of the sort that triggers dormant Commerce Clause analysis." *Id.* at 9. The Court reviewed a number of inter-governmental agreements providing exemptions to foreign air carriers from "national duties and charges" and concluded that "the facts presented by this case show that the federal government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel." *Id.* at 12.

This Court opined that, with respect to the power of the States to tax aviation fuel, "the case does not call for dormant clause analysis at all." *Id.* From the "negative implication[s]" of the federal actions, this Court determined that the United States had "at least acquiesced" in state taxes of fuel used by foreign carriers in international travel. *Id.* Thus the federal government had chosen "not to preclude local taxation." *Id. See Merrion*, 455 U.S. at 154. Under this Court's analysis, the statutory reservation to the States to assess sales taxes, together

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[7] In his concurring opinion in *Wardair*, Chief Justice Burger was troubled by the Court's decision to proceed with a Commerce Clause analysis:

> By refusing to decide this case solely on the express language of 1513(b) and instead entering the cloudy waters of this Court's 'dormant Commerce Clause' doctrine the Court fails to honor the choice already pointedly made by Congress following its extensive consideration of the problem of state taxation in this area.

Id. at 17.

with the *absence* of any congressional proscriptions against such taxation of foreign carriers ended the dormant Commerce Clause inquiry.

The AHTA's authorization of the imposition of reasonable service charges provides an even greater articulation of congressional intent. As Chief Justice Burger noted in his concurrence in *Wardair*, "there is nothing dormant" where Congress has identified particular taxes and authorized their imposition. *Id.* at 13.[8] There is uncertainty neither as to what charges may be imposed nor upon whom they may be levied. Here, domestic airlines challenge landing fees, terminal building rental rates and amortization fees, all authorized by the AHTA. Through explicit reference in § 1513(b), Congress expressly permits government-owned airports to charge "reasonable rental charges, landing fees and other service charges . . . for the use of airport facilities." Therefore, in addressing reasonableness challenges brought by domestic airlines, courts may in fact "rely on the existence of this section" to foreclose Commerce Clause review. 477 U.S. at 7.

In its earlier consideration of the AHTA, this Court found little doubt as to the statute's purpose. In *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983), the Court

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[8] Justice Burger's opinion anticipated this very case. The Chief Justice commented:

> Just as we need not look beyond the plain language "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry effecting interstate commerce," *Aloha Airlines*, 464 U.S. at 12, we need not look beyond the plain language of a federal statute which unambiguously authorizes the States to impose a particular kind of tax. Section 1513(b) authorizes state sales taxes on goods when used in air commerce. While Congress has not explained exactly why it made the distinction between taxes prohibited under § 1513(a) and those permitted under § 1513(b), "Congress chose to make the distinction and the courts are obliged to honor this Congressional choice." 464 U.S. at 12 n. 6.

477 U.S. at 17.

construed 49 USC App. § 1513(a) to preempt Hawaii's imposition of a gross income tax on airlines. Notwithstanding Hawaii's efforts to cast its tax as "a means of taxing the [airline's] personal property," the plain language of the federal statute mandated its invalidity. When a congressional act "unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted." 464 U.S. at 12. This Court considered itself "bound by the plain language of the statute." *Id.* at 16, n. 10. Given Congress' clear "authority to regulate state taxation of air transportation in interstate commerce," there was no question about the applicability of the statute. *Id.*, (citing *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 150 (1979)).

This Court noted that in the AHTA Congress chose to prohibit certain assessments and to specifically authorize others. Because the statutory designations are quite clear, courts are "obliged to honor this congressional choice." 464 U.S. at 13, n. 6. What is true of statutory proscriptions is equally true of statutory authorizations. To employ this Court's language in *Aloha Airlines* for purposes of the instant case, the Court of Appeals would have "erred in failing to give effect to the plain meaning of" § 1513(b) had it ignored the service fee authorization and allowed Petitioners to maintain a dormant Commerce Clause claim. *Id.* at 12.

C. The Sixth Circuit Ruling Comports With Other Federal Court Decisions In Airport Service Fee Cases

Since this Court issued its decision in *Aloha Airlines*, several lower federal courts have applied the AHTA in actions challenging airport fees. These cases further demonstrate that the AHTA provides an unmistakable manifestation of congressional intent to supplant the Commerce Clause.

Most recently, in a case where it considered administrative and judicial challenges to an airport landing fee scheme under the AHTA and the Airport and Airway Improvement Act of 1982, 49 USC App. § 2210, the First Circuit determined that no "constitutional test" was applicable. *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 174 (1st Cir. 1989). The Court of Appeals declined to review the challenged fees under the Commerce Clause standard articulated in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), because such a review would be "inconsistent with the extensive and preclusive regulatory scheme for a uniform national aviation system. . . ." 883 F.2d at 174. The inconsistency lies in the attempt to apply broad constitutional principles to a fee program for which Congress has provided particular statutory standards. *Id.* The First Circuit determined that "[W]here '*specific* congressional action' is the source of the contention, we look to that source in determining whether it preempts the local legislation." *Id.* (citing *New Orleans v. Dukes*, 427 U.S. 297, 304 (1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 154-55.)

Earlier, in *Indianapolis Airport Authority v. American Airlines, Inc., et al.*, 733 F.2d 1262 (7th Cir. 1984), the Seventh Circuit found that the AHTA's reasonableness standard provided sufficient guidance in adjudicating the legality of airport service charges. The Court of Appeals noted that "reasonableness is not defined, but the statute has a history and a context that enables us to give meaning to the term." *Id.* at 1265. The Court of Appeals also addressed the availability of Commerce Clause review. Relying on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Seventh Circuit dismissed the dormant Commerce Clause claim and stated that rates should be reviewed only to determine if "they are consistent with the congressional policy." 733 F.2d at 1266. Thus, irrespective of their ultimate determination as to the reasonableness of the various fees assessed under the AHTA, courts have uniformly concluded that the dormant Commerce Clause has no place in the

debate. *See also City and County of Denver v. Continental Airlines, Inc.*, 712 F. Supp. 834, 838-840 (D. Colo. 1989); *Island Aviation, Inc. v. Guam Airport Authority*, 562 F. Supp. 951, 959 (D. Guam 1982).

Accordingly, as this Court's decision in *Wardair* portends, the clear language of the AHTA displaces the dormant Commerce Clause and authorizes the assessment of fees at issue in this case.

III. THIS COURT'S DETERMINATIONS OF CONGRESSIONAL AUTHORIZATION IN THE AREA OF INTERSTATE COMMERCE SUPPORT THE CONCLUSION THAT THE COMMERCE CLAUSE IS INAPPLICABLE TO FEES AUTHORIZED BY THE AHTA

Although the States maintain that *Wardair* and the plain language of the AHTA provide an ample basis to affirm the judgment of the Sixth Circuit, this Court's decisions in other Commerce Clause cases provide further support for the conclusion that the dormant Commerce Clause is inapplicable to fees that have been assessed pursuant to the AHTA. Over the past dozen years this Court has on several occasions confronted the question of whether a particular congressional action or inaction constituted the requisite authorization to States to burden interstate commerce. A review of these decisions confirms that the Court of Appeals correctly interpreted the AHTA in the instant case.

A. The AHTA Expressly Reserves To The States Authority To Charge Reasonable Fees

In its *amicus* brief, American Trucking Associations, Inc. ("ATA") relies upon several decisions in which this Court did not find sufficiently "clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate com-

merce. . . ." *See* ATA Brief, at 8-10. In each of these cases, this Court determined that the legislation relied upon by the States to immunize the state acts from Commerce Clause attack, instead limited only the extent of federal preemption. In each statute considered, Congress inserted "savings clauses" to preserve state authority in matters not federally regulated, but did not "affirmatively sanction" any state action. The statutes preserved only the balance of the State's otherwise valid regulatory power, in relation to the specific federal preemption.[9]

For example, in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), this Court evaluated whether § 201(b) of the Federal Power Act, 16 U.S.C. §§ 792 *et seq*, permitted States to prohibit the exportation of hydroelectric power from within their borders. That subsection provided that a preceding section, conferring exclusive interstate jurisdiction upon the Federal Power Commission,[10] "shall not . . . deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line." This Court determined that Congress had not affirmatively granted power to the States, but had only left standing "whatever valid state laws then existed. . . ." *Id.* at 341. The reservation to the States contained in the Federal Power Act authorized neither particular rate levels nor any rate-making methodology.

Similarly, in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court declined to find that a section of the Bank Holding Company Act, 12 U.S.C. § 1842, which provided that States are to retain "such powers and jurisdiction" over

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[9] ATA's argument would have merit were the government relying on 49 USC App. § 1305(b) to justify the instant fees. That provision, which is also a part of the Federal Aviation Act, reserves to the States "the authority . . . to exercise its proprietary powers and rights," and is more properly analogized to the statutes at issue in the savings clause cases.

[10] Now the Federal Energy Regulatory Commission.

banks which they currently or may thereafter have, authorized States to exclude out-of-state, non-bank financial services businesses. *Id.* at 49. This Court construed this statute as it had the Federal Power Act, finding no statutory basis to conclude that Congress had reserved to the States the additional authority to regulate non-banking businesses, without being subject to the dormant Commerce Clause.

The same result was reached by this Court with respect to Congress' general reservation of authority to the States over water law. In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), this Court evaluated parts of the Reclamation Act of 1902, 32 Stat. 390, which, like other federal statutes regulating certain aspects of ground water usage, provided that "nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the central appropriation, use, or distribution of water used in irrigation." *Id.* at 959. The Court determined that neither this language, nor that of another provision of the Act directing the Secretary of the Interior to conform his acts to state law, indicated "that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 960.

Thus, although the prefatory language in the savings clause cases is similar to that in § 1513(b), the matters referenced are significantly different than those set forth in the AHTA.[11] None

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[11] In one of this Court's more recent applications of its standards for identifying the requisite Congressional authorization, this Court was again confronted with the Federal Power Act's "savings clause." *Wyoming v. Oklahoma*, 502 U.S. ____, 112 S. Ct. 789 (1992). The statute, 16 U.S.C. § 824(b) (1), reserves retail rate-making authority to the state, but does not identify specific energy sales subject to state regulation or set forth permissible rate-making standards. In this case, as in earlier ones, it is apparent from the "plain terms" of the statute that "Congress did no more than leave standing whatever valid state laws then existed" in the regulated area. *Id.* at 802 (citation omitted). Clearly, only otherwise "lawful" state authority was thus preserved.

of these decisions controls the case at bar because the AHTA presents a far more affirmative reservation.

Under the AHTA, the power to charge a specific type and quality of fee is reserved to the States. Congress expressly reserves to governmental entities owning airports the specific authority to assess "*reasonable* rental charges, landing fees, and other service charges . . . *for the use of airport facilities*." 49 USC App. § 1513(b) (emphasis added).[12] The fact that the authorization is phrased as a "savings clause" is of no significance. Congress authorized the levy of particular charges and provided the qualitative standard for their proper imposition.[13] Nothing is thus "saved" to "otherwise valid" state law. Congress has in effect "struck the balance it deems appropriate" with respect to such airport fees. *See Merrion*, 455 U.S. at 154. Courts must uphold federal statutes so long as the activity which Congress has chosen to regulate or to leave open to state regulation arguably is related to, or has an effect on, interstate commerce. *See*, 2 Ronald D. Rotunda, *Treatise on Constitutional Law*, § 11.5 (1992). When such action is taken by Con-

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[12] In his Amicus Brief on Petition for Writ of Certiorari, the Solicitor General argues that Congress did not intend to regulate airport service fees through its enactment of the AHTA, but intended only to set forth the types of taxes and charges which States are prohibited from imposing on air commerce and those which States are *not* prohibited from imposing. *See* Brief for United States at 11. While the Solicitor General maintains that other federal statutes, *see* footnote #15, *infra*, regulate the challenged fees, the States and the Solicitor General agree that "Congress has explicitly and unambiguously addressed the subject of airport fees and rentals charged to all airport users." U.S. Brief at 19.

[13] The AHTA limits the authorized fees to those for airport use and requires that the fees be reasonable. 49 USC App. § 1513(b). Implicit in this Court's holding in *Wardair*, however, is the conclusion that the authorization to assess service charges, standing alone, will remove any Commerce Clause issue, even absent the additional requirements of § 1513(b). Thus, whether the authorization is unconditional or qualified is of no consequence.

gress, "courts are not free to review state taxes or other regulations under the dormant Commerce Clause." 455 U.S. at 154.

B. This Court Has Inferred A Congressional Desire To Displace The Commerce Clause When Necessary To Effectuate A Statutory Purpose

This Court has also found the requisite authorization to States in a number of cases where Congress through various means has "affirmatively sanction[ed]" certain designated state acts. *See White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983). These affirmative designations have, either by inclusive language or inescapable logic, indicated a congressional approval of the particular state action challenged under the Commerce Clause.

For example, in *Merrion*, 455 U.S. 130, petitioners challenged the Indian tribe's severance tax which applied to some but not all oil and gas extractions. Relying on *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 421-427 (1946), this Court determined that "by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect," Congress had "affirmatively acted" with respect to the challenged tax, thereby obviating the need for Commerce Clause judicial review. 455 U.S. at 155. The Court held that, unlike cases involving state taxes for which specific federal approval is not required, Commerce Clause review of the Indian tax measures was unnecessary because it "would duplicate the administrative review called for by the congressional scheme." *Id.* at 156. Likewise, judicial review under the Commerce Clause would duplicate the review required by the substantive "reasonable" standard of the AHTA.[14] Just as where Congress has provided

[14] The Solicitor General argues that the issue of "reasonableness" under the AHTA should be addressed by the Secretary of Transportation in the first instance. *See* Brief for United States as Amicus Curiae at 9-16.

an "administrative process" to monitor state governmental acts, where it has provided a comprehensive regulatory scheme within which particular assessments are reserved to state determination, courts should limit their review to compliance with the specific statutory requirements. 455 U.S. at 155.[15]

Similarly, in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), this Court noted that the Commerce Clause is "not a restriction" on Congress' authority, and, to the extent Congress authorizes expenditures by state and local governments, the expenditures are not subject to the dormant Commerce Clause even if they "interfere[ ] with interstate commerce." *Id.* at 213. In *White*, federal regulations directing that certain federal funds be expended in programs provided for persons "residing in the area" authorized discriminatory state action undertaken in conformance thereto. 24 C.F.R. § 135.1(a) (2) (i) (1982). As a result of this specific congressional authorization, the Mayor's executive order that construction projects be performed by a work force consisting of at least half Boston residents did not present a dormant Com-

[15] The parties concur that Congress has provided such a scheme here. Petitioners and Respondents agree that the AHTA must be read in conjunction with other portions of the Federal Aviation Act, of which it is a part, as well as the Airport and Airway Improvement Act of 1982, 49 USC App. § 2201 et seq. *See* Brief of All Respondents in Opposition to Petition for Writ of Certiorari, at 10; Brief for Petitioners at 29, n. 33.

merce Clause issue. *Id.* at 213.[16] The congressional authorization contained in the AHTA is clearer still, as it is "expressly stated." *See Wunnicke*, 467 U.S. at 90.

C. Unequivocal congressional Language Authorizing State Action Will Be Given Broad Effect

This Court has evaluated "unequivocal language" similar to that found in the AHTA in its cases involving the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* In *Western and Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 648 (1981), this Court applied the holding of *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), in rejecting the insurer's challenge to California's retaliatory insurance tax. The Court held that the language of the McCarran-Ferguson Act made clear that discriminatory state insurance taxes may not be challenged under the dormant Commerce Clause. Section 1 of the Act states:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the

[16] Conversely, the requisite certainty was found to be lacking in the congressional action reviewed in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). There, contrary to Alaska's urging, this Court determined that Congress' historical "primary manufacture" requirement for timber taken from federal lands was an insufficient basis upon which to support an inference that it intended to authorize a similar policy with respect to state lands. Thus, although federal policy was clear, there was no evidence in the federal statute and regulations of a "congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause." *Id.* at 90 (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (internal quotation marks omitted)). In *Wunnicke*, this Court determined that a mere inference from an analogous or parallel federal law was insufficient to manifest congressional intent with respect to state law. *But see Wardair*, 477 U.S. 1. No such inferences need be drawn to find the requisite congressional authorization in the instant case.

> part of Congress shall not be construed to impose any barrier to the regulation or taxation of such businesses by the several States.

15 U.S.C. § 1011.

The statutory language makes manifest congressional intent. Congress' inaction, which ordinarily would subject such state action to the negative implications of the Commerce Clause, was recast to nullify this assumption. By this designation, Congress, without express reference, removed the Commerce Clause from any consideration of state insurance regulation and taxation.[17] In determining that Congress had displaced the Commerce Clause, the Court relied upon the unambiguous inclusiveness of state regulatory authority provided under the federal Act.

Similarly, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), this Court again considered statutory language which it determined "plainly permits" the challenged state legislation. *Id.* at 169. The Douglas Amendment of the Bank Holding Company Act prohibits the Federal Reserve Board from approving interstate bank acquisitions unless the acquisition "is specifically authorized by the statute laws of the state in which such bank is located by language to that effect and not simply by implication." 12 U.S.C. § 1842(d). This Court held that state statutes "which selectively authorize interstate bank acquisitions on a regional basis" were plainly authorized by the Douglas Amendment. The Court concluded its brief discussion of the Commerce Clause claim by noting that "when Congress so chooses, state actions which it plainly contemplated are invulnerable to

[17] Ironically, if Congress were required, as Petitioners assert, to expressly state its intention to displace the Commerce Clause, there would be little need for the judicial principles announced in the cases discussed in this Section.

constitutional attack under the Commerce Clause." *Id.* at 174. The AHTA's service fee authorization renders the instant assessments similarly invulnerable.

Because Congress' authority under the Commerce Clause is plenary, it includes within it the "power to regulate free trade as well as burden it, to encourage commercial intercourse or to prohibit it." Julian N. Eule, "Laying the Dormant Commerce Clause to Rest," 91 Yale L. J. 425, 434 (1982). When Congress chose to authorize States to assess airport service charges, it exercised that authority, expressing its will as to a particular matter of interstate commerce. Therefore the Court of Appeals correctly found that Commerce Clause review is foreclosed by the express terms of the AHTA.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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